

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TERENCE ALVIN JOHNSON,

Petitioner,

Civil No. 2:09-CV-10395

v.

HONORABLE GERALD E. ROSEN

CHIEF UNITED STATES DISTRICT JUDGE

SHIRLEY HARRY,

Respondent,

/

OPINION AND ORDER DENYING THE MOTION FOR INVESTIGATIVE ASSISTANCE

On March 6, 2009, this Court held petitioner's habeas application in abeyance and administratively closed the case, in order to allow petitioner to return to the state courts to exhaust additional claims that had not been presented to the state courts.

Johnson v. Harry, No. 2009 WL 596130 (E.D. Mich. March 6, 2009). Petitioner has now filed a motion for investigative assistance. For the reasons stated below, the motion is denied without prejudice.

The motion for investigative assistance is premature because petitioner has yet to completely exhaust his state post-conviction remedies. Petitioner filed a post-conviction motion for relief from judgment in the trial court, which was denied on July 14, 2009. Petitioner, however, has failed to appeal the denial of his post-conviction motion to the Michigan Court of Appeals or the Michigan Supreme Court.

As a general rule, a state prisoner seeking federal habeas relief must first exhaust his available state court remedies before raising a claim in federal court. 28 U.S.C. § 2254(b) and (c). See *Picard v. Connor*, 404 U. S. 270, 275-78 (1971). Denial

of a motion for relief from judgment is reviewable by the Michigan Court of Appeals and the Michigan Supreme Court upon the filing of an application for leave to appeal. M.C.R. 6.509; M.C.R. 7.203; M.C.R. 7.302. See *Nasr v. Stegall*, 978 F. Supp. 714, 717 (E.D. Mich. 1997). A criminal defendant in Michigan has twelve months from the denial of a motion for relief from judgment by the trial court to file an application for leave to appeal with the Michigan Court of Appeals. M.C.R. 6.509 (A); M.C.R. 7.205(F)(3). Where a habeas petitioner has an opportunity under state law to file an appeal following the state trial court's denial of his state post-conviction motion, the petitioner has failed to exhaust his state court remedies. See *Cox v. Cardwell*, 464 F. 2d 639, 644-45 (6th Cir. 1972).

Because petitioner has failed to appeal the denial of his post-conviction motion to the Michigan Court of Appeals or to the Michigan Supreme Court, he has failed to satisfy the exhaustion requirement. See e.g. *Paffhausen v. Grayson*, 238 F. 3d 423, No. 2000 WL 1888659, * 2 (6th Cir. December 19, 2000); *Mohn v. Bock*, 208 F. Supp. 2d 796, 800 (E.D. Mich. 2002).

State collateral review proceedings are not matters which are considered "ancillary" to § 2254 proceedings and are therefore not proceedings to which a federal court may appoint an attorney, expert, or investigator to assist a state prisoner pursuant to 18 U.S.C.A. § 3006A(c). See *In re Lindsey*, 875 F. 2d 1502, 1508 (11th Cir. 1989). A habeas petitioner is not entitled to compensation for experts or investigators until all of his claims have been exhausted in the state courts. See *Patrick v. Johnson*, 48 F. Supp. 2d 645, 646 (N.D. Tex. 1999). Because petitioner has yet to exhaust his claims in his state post-conviction proceedings, he is not entitled to the appointment of an investigator pursuant to 18 U.S.C.A. § 3006A(c).

Based on the foregoing, IT IS HEREBY ORDERED that the motion for investigative assistance is DENIED WITHOUT PREJUDICE.

s/Gerald E. Rosen
Chief Judge, United States District Court

Dated: October 2, 2009

CERTIFICATE OF SERVICE

I hereby certify that on October 2, 2009, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to the following: Brad H. Beaver, and I hereby certify that I have mailed by United States Postal Service the paper to the following non-ECF participants:

Terence Alvin Johnson, ##464914, Muskegon Correctional Facility, 2400 S. Sheridan, Muskegon, MI 49442.

s/Ruth A. Brissaud
Ruth A. Brissaud, Case Manager
(313) 234-5137